COMMISSION'S REQUEST FOR RECONSIDERATION

I. Introduction

The Commission requests reconsideration of the Panel's April 2004 decision remanding the Commission's December determination. The Panel has manifestly and repeatedly overstepped its authority as established by the North American Free Trade Agreement (NAFTA) by failing to apply the correct standard of review and by substituting its own judgment for that of the Commission. Under well-established U.S. law, NAFTA panels, like U.S. courts, review Commission decisions for reasonableness and to assess whether they are supported by substantial evidence. The Panel's role is not to substitute its view of the record for the Commission's judgment. In this case, the Panel has clearly rejected the substantial evidence set forth by the Commission in both its original and remand determinations, choosing instead to find its views of the facts as the only reasonable interpretation.

The Commission provided the Panel with substantial evidence and a thorough analysis of that evidence clearly demonstrating that the volume of subject imports from Canada is significant, comprising over 33 percent of the U.S. market and likely to increase substantially from those significant levels; that this significant volume of imports is likely to enter at prices that suppress or depress prices in the U.S. market, with prices in 2001 at the end of the period of investigation at levels as low as they were in 2000; and that, largely as a result of these low prices, the U.S. industry was in poor financial condition and therefore threatened with material injury by reason of imports of softwood lumber from Canada.

Secondly, the Commission, in the alternative, requests reconsideration of its request for

an extension of time to reopen the record in the event that the Panel fails to grant the Commission's request for reconsideration on the merits. The Panel violated U.S. law and basic tenets of fairness in setting the procedural deadlines in this proceeding. Under well-settled U.S. law, it is solely within the Commission's authority to decide whether to reopen the record in response to a remand from U.S. courts or NAFTA panels. The Commission did not reopen the record in the first remand from this Panel, specifically because the Panel directed us not to do so and we believed at that time we could adequately respond based on the original record. The Panel's second remand, however, discounted, ignored, or otherwise criticized probative information relied upon by the Commission in making our remand determination. We are thus unable to answer the Panel's directions without reopening the record and affording parties an opportunity to comment on additional information gathered. While we have the authority to reopen the investigative record, it is not feasible in the time frame granted by the Panel. We address more specifically below the reasons that support the Commission's requests for reconsideration by the Panel of both its April 2004 remand decision and its May 18, 2004 order denying the Commission's request for an extension of time.

II. The Panel Has Manifestly Exceeded its Authority as Set Forth in the NAFTA and U.S. Law

The Commission, both in its initial determination and in its remand determination, has set forth exhaustive and reasoned explanations for its findings and conclusions. The Commission's determinations fully enabled the Panel to perform its role of examining the rationale and evidentiary support for the Commission's findings and conclusions.

Unfortunately, both in its original remand decision and, in particular, its second remand decision, the Panel manifestly and repeatedly overstepped its authority as established by the

NAFTA by failing to apply the correct standard of review and by substituting its own judgment for that of the Commission. The NAFTA carefully delineates the role and authority of a Panel reviewing a Commission determination. The Panel is to review "whether such determination was in accordance with the antidumping or countervailing duty law" of the United States, which consists of "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the . . . [United States] would rely on such materials in reviewing a final determination of the . . . [Commission]."[1] The NAFTA requires the Panel to apply the *exact same* standard of review and general legal principles that a U.S. court would apply in reviewing a Commission determination.[2]

Under well-established U.S. law that the Panel must apply, it is required to uphold the Commission's determination in an antidumping or countervailing duty investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[3] The Supreme Court has defined "substantial evidence" as "more than a mere scintilla. . . . [and] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," taking into account the record as a whole.[4] The Federal Circuit has stated that substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding

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[1]NAFTA Article 1904.2.

[2]NAFTA Article 1904.3; NAFTA Annex 1911, which specifies that the "standard of review" for the United States is "the standard set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended . . . ."

[3]19 U.S.C. § 1516a(b)(1)(B)(i); 19 U.S.C. § 1516a(a)(2)(B)(I).

[4]Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

from being supported by substantial evidence."[5]

Thus, the Panel must uphold a Commission determination that is supported by substantial evidence, even if Complainants can hypothesize and point to evidence that could support a reasonable basis for a contrary determination, and the Panel agrees.[6]

Under U.S. law, reviewing courts/panels must afford deference to the agency tasked with making the complex determinations required under the antidumping/countervailing duty law. The statute provides that "the decision of . . . the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision."[7] The statute directs the Commission to consider specific factors in its analysis, and provides the Commission discretion to determine the weight to be accorded each factor set forth in the statute for its consideration.[8] The Commission's reviewing courts have repeatedly

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[5]Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984), quoting Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1966); accord Indorama Chemicals (Thailand) Ltd. et al. v. United States International Trade Commission, Slip Op. 02-105 at 5 (CIT, Sept. 4, 2002).

[6]Asociacion de Productores de Salmon y Trucha de Chile AG v. United States) ("Chilean Salmon"), 180 F. Supp.2d 1360, 1364 (CIT 2002) ("the Court must sustain the Commission's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions."); see also Titanium Metals Corp. v. United States, 155 F. Supp.2d 750, 755 (CIT 2001). As the Federal Circuit has further stated, "An appellate court is not the initial decision maker, and thus cannot substitute its judgment for that of the fact finder if it is supported by substantial evidence." Grupo Industrial Camesa v. United States, 85 F.3d 1577, 1582 (Fed. Cir. 1996); see also Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 12 (Nov. 4, 1994) ("The reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the Commission").

[7]28 U.S.C. § 2639(a)(1).

[8]S. Rep. No. 96-249, at 87-88 (1979) ("[n]either the presence nor the absence of any [particular] factor listed . . . can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.").

affirmed that "[t]he Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis."[9] Thus, as another Binational Panel has recognized, "[t]his function permits the Commission, inter alia, to accept, to reject, or to qualify the evidence presented by the parties, which (as in the record before us) will normally be contradictory and will normally be self-interested."[10] Or as the Federal Circuit has explained, "[t]he Commission's decision does not depend on the 'weight' of the evidence, but rather on the expert judgment of the Commission based on the evidence of record."[11] Similarly, it has stated that the question for the reviewing Court:

> is not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance. By statute, Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness.[12]

Thus, the task of the Panel as established by NAFTA and set forth in U.S. law is only to review those decisions for reasonableness; that is, the question for the Panel is "does the administrative record contain substantial evidence to support it and was it a rational decision?"[13]

The principles discussed above are, beyond debate, the foundation for any review of

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[9]Chilean Salmon, 180 F. Supp. 2d at 1370, quoting Goss Graphics System, Inc. v. United States, 33 F. Supp. 2d 1082, 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[10]New Steel Rails from Canada, USA-89-1904-09 and 10, at 79 (Aug. 13, 1990) (footnote omitted).

[11]Matsushita, 750 F.2d at 933.

[12]U.S. Steel Group v. United States, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

[13]Matsushita, 750 F.2d at 933 (Fed. Cir. 1984).

Commission decisions. In its most recent statement reaffirming these principles,[14] the Court of Appeals for the Federal Circuit, whose decisions are binding upon the Panel, set forth yet again the well-established role and authority of the Commission and those of reviewing courts. In rejecting a decision by the Court of International Trade that overstepped that lower court's authority, the Federal Circuit stated:

> Finally, it is ultimately irrelevant to our decision whether the Commission or the Court of International Trade did better at drawing the most reasonable inferences from the economic documents as compared to the prior testimonial assertions. Under the statute, only the Commission may find the facts and determine causation and ultimately material injury – subject, of course, to Court of International Trade review under the substantial-evidence standard. The Court of International Trade, despite its very fine opinions and analysis, went beyond its statutorily-assigned role to "review." Despite its express dissatisfaction with the fact-finding underlying the Commission's remand decision, the Court of International Trade abused its discretion by not returning the case to the Commission for further consideration. See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). Thus, to the extent the Court of International Trade engaged in refinding the facts (e.g., by determining witness credibility), or interposing its own determinations on causation and material injury itself, the Court of International Trade, we hold, exceeded its authority.[15]

In sum, the Panel is *not* permitted to substitute its judgment for that of the Commission. Rather, its well-defined role is limited to determining whether the Commission's judgment is supported by substantial evidence on the record. The Commission has repeatedly described for the Panel the parameters of the Panel's authority under the NAFTA and U.S. law. In its two remand determinations, however, the Panel has repeatedly substituted its own view of the evidence for that of the Commission. This is clearly not permitted under U.S. law, which is

[14]Nippon Steel Corp. v. International Trade Commission, 345 F.3d 1379 (Fed. Cir. 2003).

[15]Nippon Steel, 345 F.3d at 1381.

binding on the Panel.[16] [17] Unfortunately, while the Panel has paid lip-service to the standards described above, it has on repeated instances, as described in more detail in Section III below, done exactly what it is not permitted to do, in clear violation of U.S. law and the NAFTA. The Commission simply cannot allow its clearly defined authority under U.S. law to be overriden by the Panel.

III. The Panel Should Reconsider Its Unlawful Conclusions Regarding the Commission's Determinations on the Volume and Price Effects of Canadian Imports, the Curbing of U.S. Production and the Threat of Material Injury

The Panel's decision directs the Commission to conduct its threat of injury analysis consistent with the Panel's findings. Because in reaching these findings the Panel clearly exceeded its authority and substituted its conclusions of what is significant or substantial for the determinations properly made by the Commission, the Commission hereby requests that the Panel reconsider these findings as well as its overall finding that the Commission's remand determination that the domestic softwood lumber industry is threatened with material injury is not in accordance with the law and is not supported by substantial evidence. Because exhaustive analysis of the Panel's errors would be impossible in the short time provided by the Panel, we

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[16]Other Panels have recognized the clear role of a panel in reviewing a Commission decision and the deference that must be paid to the Commission, stating, e.g., "[t]he substantial evidence standard generally requires the reviewing authority to accord deference to an agency's factual findings and the methodologies selected and applied by the agency." Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 13 (Nov. 4, 1994). See also Fresh, Chilled or Frozen Pork from Canada, USA 89-1904-11, at 8 (Aug. 24, 1990), citing Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989) ("great deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority.")

[17]Universal Camera, 340 U.S. at 488. Accordingly, the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence." Acciai Speciali Terni v. United States, 19 CIT 1051, 1054 (1995).

present the following as illustrative of the Panel's failure to follow the standard of review provided under U.S. law.

We note at the outset that the Panel ignores the U.S. statute's explicit direction that the Commission must consider the factors "as a whole in making a [threat] determination."[18] The Panel disregards the interrelatedness between the factors, the record evidence, and most importantly that the likely effects being assessed are interrelated and should not be considered and analyzed as isolated fragments. Rather, the Panel has viewed the threat analysis as distinctly separate from the present injury analysis and inappropriately undertaken its review in a piece-meal approach.[19] In counting the individual trees, the Panel has lost sight of the forest.

Volume of Imports is Significant. Fundamentally, the Panel has reached its own determination that the increase in the volume of imports would not be substantial and therefore could not be the basis for a determination that imports of softwood lumber from Canada

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[18]19 U.S.C. § 1677(7)(F)(ii). This provision of the statute states in relevant part:

> The Commission shall consider the factors set forth in clause (i) as a whole in making a determination of whether further dumped or subsidized imports are imminent and whether material injury by reason of imports would occur unless an order is issued or a suspension agreement is accepted under this subtitle. The presence or absence of any factor which the Commission is required to consider under clause (i) shall not necessarily give decisive guidance with respect to the determination.

See also S. Rep. No. 96-249, at 87-88 (1979) ("[n]either the presence nor the absence of any [particular] factor listed . . . can necessarily give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide."); U.S. Steel Group, 96 F.3d at 1362 (Fed. Cir. 1996).

[19]Accord NEC Corp. v. United States, 83 F. Supp.2d 1339, 1346 (CIT 1999) ("here, for example, that unused capacity and volume increases 'indicat[e] the likelihood of substantially increased imports.'"). The statute directs the Commission to consider, in addition to the relevant statutory factors, other economic factors the Commission deems relevant. 19 U.S.C. § 1677(7)(F)(i).

threatened to cause material injury to the U.S. industry producing softwood lumber. However, the evidence on the record clearly indicates that imports of softwood lumber from Canada accounted for 33.2 percent to 34.3 percent of the U.S. market for softwood lumber in the 1999-2001 period of investigation, totaling between 17,983 and 18,483 mmbf.[20] [21] Simply stated, one-third of the U.S. market, or one out of every three boards of softwood lumber purchased in the United States, is a Canadian import. We reasonably found that the large volume and market share of Canadian imports were significant[22] and were likely to increase further in the future.[23]

Nevertheless, the Panel has consistently ignored the magnitude of subject imports in the U.S. market, and the Commission's findings of their significance. Instead, the Panel repeatedly has focused only on additional future volumes of subject imports over the already significant level of such imports, even improperly considering the statutory negligibility provision in

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[20]USITC Pub. 3509 at Table IV-2 and C-1.

[21]The public or non-proprietary version of the remand determinations is contained in USITC Pub. 3658 (Dec. 2003). References throughout this submission are to the proprietary version of the remand determinations, which the Commission submitted to the Panel on December 15, 2003 (referred to herein as "Remand Determination"). The Commission's original determinations and a public version of the Views of the Commission and staff report are found in Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA- 928 (Final), USITC Pub. 3509 (May 2002). PD 423. The confidential version of the original Views of the Commission are found in CD 213, and the confidential version of the staff report is found in CD 210. This staff report contains the factual information upon which the Commission relied in both its Original Determinations and its Remand Determinations.

[22]USITC Pub. 3509 at 32 and Remand Determination at 50-55. A finding that the volume and market share of subject imports is significant is a legal finding, pursuant to 19 U.S.C. § 1677(7)(C)(i).

[23]Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 627 (CIT 1993) ("Plaintiffs were also unable to discredit Commissioner Rohr's findings that imports increased from 1986 until Commerce's suspension of liquidation in 1990, as did import penetration. Plaintiffs did not undermine Commissioner Rohr's conclusion that even in the absence of any further increases, present levels were likely to be injurious in the future.").

connection with such increases,[24] and made findings regarding the significance of further imports; findings which, as discussed above, Congress has tasked the Commission, and not the Panel, to make.[25]

In focusing on incremental increases and our characterization of the import volume as "relatively stable," the Panel overlooks our finding that the actual volume of imports from Canada, both in absolute terms and relative to consumption, was already at significant levels, i.e., accounting for approximately 34 percent of the U.S. market. More importantly, the Panel fails to recognize the implications of our findings that the volume increased even with the restraining effect of the Softwood Lumber Agreement (SLA) in place, and that substantial

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[24]We find it surprising that the Panel would even attempt to use the negligibility provision of the statute as a surrogate test for considering what constitutes a significant rate of increase in the volume of imports. The negligibility provision involves a static measure of subject imports as a share of total imports, and does not speak at all to an analysis of increases in the volume of imports, as the Panel has applied it. Imports from Canada account for 93 percent of all imports of softwood lumber into the U.S. market – 31 times the three percent negligibility threshold. The Panel, however, applied this static three percent level to the change in subject imports relative to prior subject import volumes. This is a totally impermissible and unsupportable use of the provision.

Ironically, while individual country non-subject imports could have properly been deemed negligible, with no individual country accounting for more than 1.3 percent of total imports, the Panel in its first Decision made a finding, exceeding its authority, that non-subject imports increased substantially, while simultaneously discounting imports from Canada that accounted for 93 percent of total imports. Original Panel Decision (dated September 5, 2003) at 103 (Panel Decision I).

[25]U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996) ("Congress has allocated to the Commission the task of making these complex determinations. Ours is only to review those decisions for reasonableness."); Grupo Industrial Camesa v. United States, 85 F.3d 1577, 1582 (Fed. Cir. 1996)("An appellate court is not the initial decision maker, and thus cannot substitute its judgment for that of the fact finder if [the conclusion] is supported by substantial evidence."); Acciai Speciali Terni, 19 CIT at 1054 (1995) (the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence."); see also Certain Flat-Rolled Carbon Steel Products from Canada, USA-93-1904-05, at 12 (Nov. 4, 1994) ("The reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the Commission").

increases occurred during periods when such imports were not subject to import restraints.[26] Subject imports' relatively stable share of the U.S. market during the SLA period does not negate the finding that the market share was already significant. Rather, the Commission reasonably found it to be an indicator of the SLA's restraining effect, supporting a finding of likely substantial increases in subject imports after the SLA expired.

Despite the restraining effect of the SLA, which imposed $50-100 fees per thousand board feet on imports over specified levels,[27] the volume of subject imports from Canada increased above the already significant level by 2.8 percent from 1999 to 2001.[28] While imports of softwood lumber from Canada held a substantial share of the domestic market, at the significant 34 percent level during the period of investigation,[29] it had been higher (35.7 percent)

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[26]These investigations, in contrast to most original antidumping or countervailing duty investigations, involved imports that during the period of investigation were subject to a trade restraining agreement, and immediately thereafter, these investigations. Thus, to place them in the appropriate context, we considered the restraining effects of the SLA on imports and trends in subject imports during periods when such imports were not subject to some type of restraint, in making our findings.

[27]The SLA set a limit for imports on a fee-free basis and two levels of quotas for imports above the fee-free level. Each year during the pendency of the SLA, Canadian producers used their fee-free quota, substantially all of their $50 fee quota in every year except 2000-2001, and in each year, including 2000-2001, exported significant quantities of softwood lumber with $100 fees. Canadian producers also shipped significant quantities of bonus exports each year. (Bonus exports are Canadian exports of softwood lumber that enter the U.S. market without fees and are not subject to the quota limitations pursuant to Article III of the SLA.) See, e.g., USITC Pub. 3509 at Table IV-3 and Petitioners' Prehearing Brief at Exh. 62.

[28]The volume of imports of softwood lumber from Canada increased from 17,983 mmbf in 1999 to 18,483 mmbf in 2001. USITC Pub. 3509 at Tables IV-1 and C-1. Conversely, the value of subject imports declined by 16 percent, from $7.1 billion in 1999 to $6.0 billion in 2001, a decline of 16 percent. Id.

[29]As a share of apparent domestic consumption, subject imports from Canada increased from 33.2 percent in 1999 to 34.3 percent in 2001. USITC Pub. 3509 at Table IV-2 and C-1.

prior to the imposition of the restraining effect of the SLA.[30] Thus, the Commission reasonably found that the SLA had constrained the volume and market share of subject imports, and substantial evidence supported this finding.[31] [32]

The Commission reasonably examined evidence regarding subject imports during restraint-free periods (i.e., prior to the adoption of the SLA between 1994 and 1996, and the period immediately after the SLA expired but before suspension of liquidation in these investigations) as highly probative evidence of how subject imports have entered the U.S. market, and would enter the U.S. market in the imminent future, when not subject to trade restraints. In both periods without trade restraints, subject imports increased substantially.

During the period immediately after the SLA expired (April 2001)[33] and before

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[30]Subject imports held a U.S. market share of 35.7 percent in 1995, the year prior to the SLA, and 35.9 percent in 1996, the year the SLA was imposed (on May 29, 1996). During the first full year under the SLA (1997), subject imports declined to a U.S. market share of 34.3 percent, the same market share held in 2001, with a range from 33.2 percent to 34.6 percent during the SLA period. USITC Pub. 3509 at Table IV-2.

[31]The Panel acknowledges that "it can be fairly concluded that the SLA had *some* restraining effect" but finds that because "it is not possible to appraise the magnitude or impact of that effect" the Commission's observations "fail significantly to advance its finding." Second Panel Decision (circulated April 29, 2004) at 26 ("Panel Decision II"). As discussed above, it is the Commission, not the Panel, that is tasked with weighing the evidence and making assessments. See e.g., U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996); Goss Graphics System, Inc. v. United States, 33 F. Supp. 2d 1082, 1100 (CIT 1998), aff'd, 216 F.3d 1357 (Fed. Cir. 2000).

[32]To address the Panel's concerns regarding the magnitude or impact of the restraining effect of the SLA, Chairman Okun, Commissioner Koplan and Commissioner Lane note that if the Commission had been provided reasonable time to conduct a thorough remand investigation, we would have sought additional data and requested additional information regarding studies placed in the record that purport to appraise the magnitude or impact of the SLA.

[33]The SLA expired on March 31, 2001; thus, the SLA was in effect for 1999, 2000, and only the first quarter of 2001.

suspension of liquidation (August 2001), subject import volumes were substantially higher, by a range of 9.2 percent to 12.3 percent, than the comparable April-August period in each of the preceding three years (1998-2000).[34] While the rate of increase in imports slowed when bonding requirements associated with the preliminary countervailing duties were imposed in August 2001, they continued to enter the U.S. market in the April-December 2001 period at a rate 4.9 percent higher than the comparable 2000 period.[35]

The Panel recognizes that substantial evidence supports the "Commission's reliance on import data during the April 2001 to August 2001 period to draw inferences about the likely future import trends after the period of investigation."[36] Yet, the Panel concludes that "[b]y its nature, this finding is of little significance in supporting the Commission's ultimate conclusions."[37] As discussed above, it is for the Commission, not the Panel, to determine the

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[34]Official monthly import statistics. Total subject imports of softwood lumber by volume for the period of April to August 2001 were 11.3 percent higher than the comparable April-August period in 2000, 9.2 percent higher than April-August 1999, and 12.3 percent higher than April-August 1998. The evidence also shows that the subject imports by volume for the period between April and August 2001 was higher in each month than the comparable month in 2000, with the exception of June, by a range of 7.5 percent to 25.6 percent. Id.

[35]Subject imports increased by 2.4 percent from 2000 to 2001, and by only 0.4 percent from 1999 to 2000. During the April-August 2001 period, which was subject to the pending investigation but free of trade restraints, subject imports increased by 11.3 percent compared with the same period in 2000. Moreover, for the April-December 2001 period, during part of which imports were subject to the August CVD preliminary finding, subject imports still increased, although at a lower rate of 4.9 percent, compared with the same period in 2000. USITC Pub. 3509 at Table C-1 and Official import statistics.

[36]Panel Decision II at 29.

[37]Panel Decision II at 29.

significance of this evidence.[38] Moreover, the Panel has provided no reason why import trends during the most recent period in which there were no trade restraints – a period that ended shortly before the end of the period of investigation – would be of "little significance"[39] in determining whether imports are likely to substantially increase in the imminent future. To the contrary, this evidence is a clear indicator of likely future import trends and is highly significant to the Commission's ultimate conclusion that subject imports would threaten material injury to the domestic industry. The fact that subject imports increased substantially after expiration of the SLA and have continued to increase is clearly of relevance to a threat analysis. Moreover, as discussed below, had the Commission been given a reasonable time to conduct a remand investigation, it intended to collect import data for the first quarter of 2002 to consider whether the substantial increases after the SLA expired in 2001 continued into 2002.

The Panel also has refused to consider the similar pattern of increases in subject imports during the 1994-1996 period prior to the adoption of the SLA, increases which stopped when the SLA was imposed. The Panel, as had the Canadian Parties, makes the general claim that the Commission did not consider market conditions for this period, and finds that "this is dated information of little consequence in evaluating the validity of the Commission's ultimate

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[38]See e.g., U.S. Steel Group, 96 F.3d at 1357 (Fed. Cir. 1996)("By statute, Congress has allocated to the Commission the task of making these complex determinations."); Goss Graphics, 33 F. Supp. 2d at 1100 (CIT 1998) ("The Commission has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis."), aff'd, 216 F.3d 1357 (Fed. Cir. 2000); Iwatsu Elec. v. United States, 758 F. Supp. 1506, 1510-1511 (CIT 1991) ("*significance to be assigned to a particular factor is for the ITC to decide.*" (emphasis in original)).

[39]Panel Decision II at 29.

conclusions."[40]

In requesting a reasonable period of time to conduct a thorough remand investigation, we planned to reopen the record and gather information, including data on market conditions during 1994-1996, to consider whether any specific conditions affected the pattern of increases. We also planned to collect import data for the period immediately prior to our original vote (January-March 2002) among other information, by denying the Commission's request for a reasonable remand investigative period, however, the Panel has not permitted us sufficient time to collect and analyze any additional information.[41]

Nevertheless, the simple fact is that without restraints imports have increased from an already high level: increases stopped when the SLA was imposed; substantial increases in imports occurred when the SLA expired; and increases in imports slowed when preliminary duties were imposed. This evidence clearly shows that there is a distinction in the level of imports depending on whether restraints are in place and that the import volumes are substantially higher during periods when they are not subject to restraining measures. This evidence supports our finding that subject imports are likely to increase in the imminent future, exacerbating already significant subject import volumes.

In its decision, the Panel directed the Commission to conduct its threat of injury analysis consistent with four specific conclusions of the Panel. The first of those conclusions stated that the Commission's findings regarding Canadian producers' excess production and projected increases in capacity, capacity utilization and production related to increases in imports were not

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[40]Panel Decision II at 28.

[41]Panel Decision on Motion (dated May 18, 2004) at 4.

supported by substantial evidence.

Canadian Capacity, Capacity Utilization, and Production Increases. The evidence regarding Canada's capacity, capacity utilization and production levels was extensive, and included both questionnaire data from Canadian producers as well as data from the Canadian government and the U.S. Department of Commerce. The record clearly indicates that Canada has very large capacity to produce softwood lumber, with capacity that could supply almost half of U.S. consumption.[42] We recognized that Canadian producers projected increases in capacity, capacity utilization and production in 2002 and 2003, despite having excess production capacity in 2001, as capacity utilization declined to 84 percent from 90 percent in 1999. Excess Canadian capacity in 2001 had increased to 5,343 mmbf, which was equivalent to 10 percent of U.S. apparent consumption.[43] Moreover, the Canadian producers expected to further increase their ability to supply the U.S. softwood lumber market, projecting increases in production of 8.9 percent from 2001 to 2003 and increases in their capacity utilization to 90 percent in 2003 (from 84 percent in 2001).[44] These increases were projected even while the evidence demonstrated that

[42]USITC Pub. 3509 at Tables VII-2 and VII-7.

[43]USITC Pub. 3509 at Tables VII-1 and C-1. The evidence showed that this increase in excess capacity could not be attributed to declines in home market shipments from 1999 to 2001, since increases in imports to the U.S. market for that period were nearly equal to the declines in home market shipments. Id. at Table VII-2. Based on questionnaire responses, home market shipments declined by 663 mmbf from 1999 to 2001 while shipments to the U.S. market increased by 525 mmbf from 1999 to 2001. Id.

[44]USITC Pub. 3509 at Tables VII-1 and VII-2.

demand in the U.S. market was forecast to remain relatively unchanged or increase only slightly.[45]

In sum, Canadian producers already possess excess capacity, and increases in capacity and production were projected for 2002 and 2003. The Panel acknowledges that "a decline in unused Canadian production capacity data *could* support such a [threat] finding," but holds that the Commission "has not tied any Canadian unused production capacity to 'the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports.'"[46] Again, there is both substantial evidence on the record of Canada's likelihood of substantial and increasing exports to the United States, and a lack of any substantial evidence to demonstrate a shift to other export markets that could absorb the very significant volume of Canada's exports to the United States.

Canadian Production Tied to the U.S. market. First, there is substantial evidence on the record regarding the tie between Canadian production and exports to the United States. The Canadian producers rely on sales in the U.S. market for about two-thirds of their production. Canadian producers are predominantly export-oriented toward the U.S. market, with exports to the United States as a share of Canadian production ranging from 63.1 percent to 68.1 percent from 1995 to 2001.[47] Canadian producers themselves projected their production would increase

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[45]USITC Pub. 3509 at II-3 - II-4; CLTA's Posthearing Brief, Vol. 2, Tab R at 1 and 3; Petitioners' Posthearing Brief, Vol. II, Appendix H, Exhibit 28 at 5 (Table 3).

[46]Panel Decision II at 15.

[47]USITC Pub. 3509 at Table VII-7.

from 2001 to 2003 by 8.9 percent.[48] Therefore, the Commission's finding of significant and increasing volume of imports is supported by substantial evidence and is entitled to deference by the Panel. But the Panel, with no evidence on the record, suggests that the Canadian industry is somehow going to shift away from shipping to the U.S. market and instead ship substantial additional quantities to the home and other unspecified markets.[49]

The statute contemplates that the Commission will consider the importance of the export industry's markets in determining threat of material injury.[50] In this case, the U.S. market has been the most important market for Canadian producers and is expected to continue to be. Other export markets accounted for only 8 to 9 percent of Canadian shipments and the Canadian home market accounted for about 24 percent for the 1999-2001 period.[51] Therefore, the availability of markets (whether other export or home) other than the U.S. market to absorb additional Canadian production of softwood lumber is limited. Canadian softwood lumber production is projected to increase, and the U.S. market would be the most likely target of those additional goods.

The U.S. export-orientation of the Canadian producers clearly provides a "tie" of the excess capacity and projected increases in capacity and production to a likely substantial increase in subject imports in the imminent future. The Panel's requirement for a more specific "tie" clearly is at odds with the recognition by the U.S. courts that the projection of future events

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[48]USITC Pub. 3509 at Table VII-2.

[49]Panel Decision II at 16-21.

[50]19 U.S.C. § 1677(7)(F)(i)(II).

[51]USITC Pub. 3509 at Table VII-2.

in the Commission's threat analysis is inherently less amenable to quantification.[52]

Canadian Producers' Export Projections. Canadian producers' export projections implausibly posited that the U.S. market would suddenly not continue to account for at least 65 percent of additional Canadian production, consistent with historical levels, but rather projected that only 20 percent in their additional production would be exported to the United States.[53] The Canadian producers projected that export shipments to the U.S. market would increase, but only by 3 percent, while exports to non-U.S. markets were projected to increase by 21 percent, and shipments to the home market were projected to increase by 13 percent from 2001 to 2003.[54] Thus, the Canadian home market and non-U.S. markets were predicted to receive substantially higher shares of projected production increases, shares wholly inconsistent with the historic trends.

Given the inconsistencies with other record evidence, we reasonably discounted the Canadian producers' unsupported expectations regarding export projections and concluded that projected increases in production would likely be distributed among the U.S. market, Canadian

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[52]The Commission's reviewing courts have recognized that "[a]s it deals with the projection of future events . . . [the Commission's threat] analysis is inherently less amenable to quantification . . . ." NEC Corp. v. United States, 36 F. Supp.2d 380, 391(CIT 1998); see also Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 338 (CIT 1989); Rhone Poulenc. S.A. v. United States, 592 F. Supp. 1318, 1329 (CIT 1984). The Federal Circuit has held that predictive determinations by the Commission are by nature not "verifiable," but rather are "based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence." Matsushita, 750 F.2d at 933 (Fed. Cir. 1984). Projections involve extrapolations from existing data.

[53]USITC Pub. 3509 at Table VII-2. Over the period of investigation, the Canadian home market accounted for about 24 percent of Canadian production and non-U.S. export markets accounted for about 8-9 percent of Canadian production. Id.

[54]USITC Pub. 3509 at Table VII-2.

home market, and non-U.S. export markets in shares similar to those prevailing during the prior five years. Parties offered no positive evidence to refute our reasonable conclusion; that is, no positive evidence, such as a new supplier contract or evidence of increased sales to another specific country, which would indicate that a large share of the increased production was to shift to markets other than the U.S. market. Moreover, even though Canadian demand had declined by almost 20 percent from 2000 to 2001 and was not forecast to imminently return to 2000 levels, the Canadian producers projected that home market shipments would somehow increase beyond 2000 levels.[55] By statute, Congress has tasked the Commission with weighing the evidence, including interpreting and making assessments of the credibility of the evidence.[56] Given the evidence from all sources pointing to significant and increasing imports to the U.S. market, and the lack of substantial evidence of a marked shift in shipment patterns, the Commission's conclusions are supported by substantial evidence.

The Panel simply is wrong when it contends that the Commission "relied on these very same exporters' projections in its Final Determination" that the Panel rejected on remand.[57]

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[55]USITC Pub. 3509 at Tables VII-2 and VII-7.

[56]See, e.g., Matsushita, 750 F.2d at 935 (Fed. Cir. 1984); Kern-Liebers USA, Inc. v. United States, 19 CIT 87, 108 (CIT 1995) ("This court has recognized, however, that 'assessments of the credibility of witnesses are within the province of the trier of fact. This [c]ourt lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation," quoting, Negev Phosphates, 699 F. Supp. at 953 (footnote omitted)).

[57]Panel Decision II at 17-18. The Commission's sole reference to Canadian producers' export projections is the listing in footnote 258 of its original determination of actual and projected exports by volume and by share of Canadian shipments. This footnote also lists actual Canadian export data as a share of Canadian production. The cite is for a sentence indicating that "Canadian producers are predominately export-oriented toward the U.S. market, with exports to the United States accounting for 68 percent of their production in 2001." USITC Pub. 3509 at 41 and n. 258.

Even if the Commission had reformulated its position on remand, it is allowed to do so under U.S. law.[58] Moreover, the fact that all of the evidence considered was available in the existing record at the time of the original determination does not control whether the Commission can amend its finding on remand, or set forth its reasoning for its finding for the first time on remand, as is the case here. The Commission provided a detailed explanation to the Panel on remand as to why the Canadian export projections were inconsistent with actual data showing excess Canadian capacity, declines in home market shipments, declines in exports to other markets, and projected increases in production.[59]

The Panel weighed the evidence regarding export projections itself and concluded that the projected increases in export shipments to the U.S. market of three percent from 2001 to 2003 "would be a minimal increase in absolute Canadian exports to the United States."[60] Again, the Panel substituted its view of the evidence for that of the Commission; a substitution that, under U.S. law, reviewing courts are proscribed from making.[61]

Given the substantial and largely uncontroverted evidence of the very significant levels

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[58]Bando Chemical Industries, Ltd. v. United States, 17 CIT 798, 811 (CIT 1993) ("If a Commissioner were unable to revise his analysis on remand, that route following judicial review would be devoid of purpose."); see also Asociacion Colombiana de Exportadores de Flores v. United States, 693 F. Supp. 1165, 1172 (CIT 1988); SEC v. Chenery Corp, 332 U.S. 194, 201 (1946) ("After the remand was made, therefore, the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress.").

[59]Remand Determination at 61-63.

[60]Panel Decision II at 17; Panel Decision I at 83-84.

[61]Universal Camera, 340 U.S. at 488. Accordingly, the Panel "cannot substitute its judgment for that of the agency, nor may it reweigh the evidence." Acciai Speciali Terni v. United States, 19 CIT 1051, 1054 (1995); Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (CIT 1989).

of Canadian capacity, production and dependence on the U.S. market, the Commission requests that the Panel reconsider its conclusion that the Commission's determination regarding significant levels of Canadian capacity, excess capacity and production was not supported by substantial evidence.

Rate of Increase of Imports or Market Penetration. The second conclusion the Panel reached was that the Commission's finding regarding the volume of imports, and in particular the rate of increase in the volume or market penetration of imports, was not supported by substantial evidence. The Commission asks that the Panel reconsider this conclusion.

As discussed earlier, imports of softwood lumber from Canada have been very substantial throughout this period of investigation, accounting for between 33.2 percent and 34.3 percent of the U.S. market.[62] Neither the Panel, nor any party, disputes that subject imports will continue to enter the U.S. market at a significant level, and that they are projected to increase from that large and significant level. If imports are already significant and projected by everyone to increase, then the Panel cannot properly conclude that the volume of imports and its projected increase is not significant.

Instead, the Panel has taken the view that the only imports that the Commission can look at are those that come in over and above the already existing level of imports; that somehow the only imports that should be considered a threat to the U.S. market are the <u>additional</u> imports on

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[62]We also note that even substantial increases in absolute volume over a large baseline will not result in large percentage increases. Increases of the same absolute volume over a small baseline will result in substantially higher percentage rates of increase than those same volume increases over a large baseline. For example, if the baseline is five units and over three years it increases by five more units for a total of 10 units, the rate of increase is 100 percent. If the baseline, on the other hand, is 100 units and it increases also by 5 units over the three year period for a total of 105 units, the rate of increase is only 5 percent.

top of the more than 18,000 mmbf that entered each year during the POI. However, the statute, in defining "material injury" in the first instance and in defining it for purposes of determining whether an industry is either materially injured or threatened with material injury, requires the Commission to consider whether the volume of imports, or any increase in the that volume, is significant.[63] While the additional factors the Commission takes into account in making a threat determination include examining the rate of increase of the volume or market penetration of imports,[64] nothing in the statute suggests that the Commission must ignore the already existing volume of imports or that in applying these provisions, the Commission should not consider what the total volume of imports would likely be, examining both the current level of imports and any projections that are supported by substantial evidence for further increased imports in the future. In this case, as discussed earlier, the Commission determined that both the current level of imports and the future level of imports were significant, and further determined that the rate of increase of the volume of imports indicated the likelihood of substantially increased imports. Those are determinations that the Commission is entitled to make. The Panel cannot substitute its judgment for that of the Commission in reaching these findings.

Price Effects. The third conclusion the Panel reached is that the Commission's determination that Canadian softwood lumber was entering the U.S. market at prices that are likely to have a significant depressing or suppressing effect on domestic prices was not supported by substantial evidence.

During the period of investigation, prices for softwood lumber declined substantially,

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[63]19 U.S.C. §§1671d(b) and 1673d(b); 19 U.S.C. § 1677(7)(B).

[64]19 U.S.C. § 1677(7)(F).

particularly in 2000, due to excess supply in the price sensitive U.S. market, despite high, but relatively stable, demand.[65] Prices in 2001 at the end of the period of investigation were again at levels as low as they were in 2000.[66] These price declines occurred while demand, considered on a seasonal basis, remained relatively stable at historically very high levels. As the Commission has repeatedly found, during the period of investigation, the substantial volume of subject imports had *some* adverse effects on prices for the domestic product. The condition of the domestic industry, and in particular its financial performance, deteriorated over the period of investigation. This deterioration was largely a result of the substantial declines in price.[67] The declines in the industry's performance, particularly its financial performance, made it vulnerable to future injury. Thus, the price trend evidence supports our conclusion that subject imports are entering at "current prices" that are likely to have a significant depressing or suppressing effect on domestic prices.[68]

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[65]USITC Pub. 3509 at Tables IV-2, V-1, and V-2, and Figures V-3 - V-5. In particular, prices of both the domestically-produced and imported Canadian softwood lumber products increased through the second or third quarters of 1999, before falling substantially through the third and fourth quarters of 2000 to their lowest point for the 1999-2001 period. For example, the price of SYP fell 32.9 percent, from a peak of $434/mbf in the third quarter 1999 to a low of $291/mbf in the fourth quarter 2000. The price of WSPF (a product mostly imported from Canada) fell 39.3 percent, from a peak of $336/mbf in the second quarter 1999 to $204/mbf in the fourth quarter 2000. USITC Pub. 3509 at Tables V-1 and V-2.

[66]While prices for softwood lumber increased in mid-2001, at a time of considerable uncertainty in the market due to the expiration of the SLA and the commencement of these investigations, prices began to decline in the third quarter of 2001 and fell substantially in the fourth quarter of 2001 to levels as low as those in 2000. USITC Pub. 3509 at V-11, Tables V-1 and V-2, and Figures V-3 - V-5.

[67]USITC Pub. 3509 at 36-39.

[68]In evaluating the evidence in these investigations, we consider present and likely price effects by evaluating price trends for softwood lumber during the period of investigation. *See* 19 U.S.C. § 1677(7)(F)(i)(IV).

The Panel relies on data outside the period of investigation, pricing data for first quarter of 2002 supplied by Canadian parties, to hold that the record evidence does not support the ITC's conclusion that prices declined substantially at the end of the period of investigation.[69] But the Panel's selective adoption of certain comparisons proffered by Canadian parties does not withstand scrutiny in light of all of the record evidence. We note that the Panel addressed pricing data outside the period of investigation for the first time in its Decision circulated on April 29, 2004. If the Commission had been provided sufficient time to conduct a thorough remand investigation, we would have reopened the record to collect all first quarter 2002 pricing data, not only that proffered by Canadian Parties and relied upon by the Panel.

The evidence demonstrates that the composite price for the first quarter of 2002 at $312 was lower than the composite price for the third quarter of 2001 at $322 and substantially lower than that for the second quarter of 2001 at $364.[70] Moreover, the Panel did not recognize that seasonality generally affects comparisons between fourth and first quarter prices, *i.e.*, composite prices for the fourth quarter in 1999, 2000, and 2001 were lower than those for the first quarter in 2000, 2001, and 2002, respectively.[71] While the composite price for the first quarter of 2002 at $312 was higher than that for the first quarter of 2001 at $284, it was substantially lower than the composite price of $384 for the first quarter of both 1999 and 2000. Prices at the first quarter of

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[69]Panel Decision II at 35.

[70]*Compare* CLTA's Prehearing Brief, Vol. 3, at Exh. 56 (Q1 2002 RL Framing Lumber Composite – 312) *with* ITC Report at Figure V-3 and Petitioners' Posthearing Brief, App. G at Chart 8 (RL Framing Lumber Composite, Q2 2001 – 364; Q3 2001 – 322).

[71]The composite prices for the fourth quarter in 1999 ($375), 2000 ($277), and 2001 ($279) were lower than those for the first quarter in 2000 ($384), 2001 ($284), and 2002 ($312), respectively. CLTA's Prehearing Brief, Vol. 3, at Exh. 56 *with* ITC Report at Figure V-3 and Petitioners' Posthearing Brief, App. G at Chart 8.

2001 had not yet recovered from the low levels of the third and fourth quarters of 2000 ($294 and $277, respectively) and were subject to considerable uncertainty in the market due to the pending expiration of the SLA. Thus, the fact that the composite price in the first quarter of 2002 was higher than the fourth quarter of 2001, as first quarter prices were always higher than the preceding fourth quarter, and slightly higher than one of the three quarters with the lowest prices when imports were adversely effecting the financial performance of the domestic industry, does not undermine our conclusion that imports at the end of the period "are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices."

The Panel concluded that "the Commission has not shown that subject imports, based on volume, are likely to have a significant depressing effect on domestic prices."[72] To do so, the Panel alleged the Commission was required to "make a finding that the increase in imports from Canada would outstrip the 'strong and improving demand' that it found in the U.S. market."[73] But such a requirement has no basis in law. Moreover, it also has no basis in fact since it is based on the incorrect premise that forecasts for demand projected substantial growth for softwood lumber in the imminent future.[74]

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[72]Panel Decision II at 37.

[73]Panel Decision II at 36.

[74]We note that the actual evidence in 2001 shows that the increase in subject imports outstripped demand; imports of softwood lumber from Canada increased by 2.4 percent from 2000 to 2001 and U.S. apparent consumption increased by only 0.2 percent for the same period. USITC Pub. 3509 at Table C-1. Moreover, increases in subject imports after removal of the restraining effect of the SLA were 11.3 percent higher for the April-August 2001 period compared to the same period in 2000, and 4.9 percent for the April-December 2001 period compared to the April-December 2000 period. Thus, the actual increases in subject imports at the end of the period of investigation substantially outstripped any forecasts for increases in demand for 2002 and 2003.

The Commission did not change its findings regarding the demand forecasts on remand as the Panel contends.[75] We have continued to find that the record indicates that demand in the United States was strong during the period of investigation, and that forecasts indicate continued strong, but not substantially growing, demand.[76] Moreover, it is the evidence and not the characterization that matters. And the evidence, that is, all of the evidence, and not only the selective sources cited by the Panel and Canadian Parties,[77] has never supported the theories of "substantial growth" in demand outstripping increases in imports. The evidence demonstrates, as we stated in our original determination and our remand determination, that "demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, and then begin to increase in 2003 as the U.S. economy rebounds from recession."[78] This strong demand (i.e., a high absolute level of consumption) would continue to make the U.S. market a very

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[75]Even if the Commission had changed its finding, it is not precluded under U.S. law from changing its characterization of the evidence on remand.

[76]We characterized demand as "strong" because the absolute level was higher during the period of investigation than in the preceding years. USITC Pub. 3509 at 22 and Table IV-2.

[77]For example, the Panel, as did Canadian Parties, selectively omits the less optimistic forecasts for demand from its cites to the evidence. See Panel Decision II at 31-32, n.9 which references as evidence only the RISI and Clear Vision forecasts. However, the Bank of America forecast projected a slight decline in demand for lumber in 2002 which supports the Commission's finding of relatively stable (flat) or slight increases. Bank of America, "Wood & Building Products Quarterly," at 12 (Nov. 2001) *(*Bank of America projected "U.S. consumption [for lumber] to decline by a little less than 1% next year [2002] . . . . consumption growth should remain below the 2% range in those two years [2003 and 2004]"*)* in Petitioners' Posthearing Brief at 2 and Appendix H, Exh. 2 at 11. (See Exhibit 2 to ITC's January 26, 2004 Comments).

[78]Remand Determination at 77-78. In the original determination, the Commission found that: "Demand for softwood lumber is forecast to remain relatively unchanged or increase slightly in 2002, followed by increases in 2003 as the U.S. economy rebounds from recession." USITC Pub. 3509 at 42-43. The Commission made a similar finding in its Conditions of Competition section, stating "lumber consumption is forecast to either remain flat or increase slightly in 2002, followed by increases in 2003." Id. at 23.

attractive, and necessary, one for Canadian producers (as the U.S. market has consistently accounted for about 65 percent of Canadian production). Thus, subject imports would continue to play an important role in the U.S. market, and conditions in the market indicate that there would likely continue to be increases in such imports.

Regarding likely pricing effects, the evidence demonstrates that imported and domestic softwood lumber are interchangeable and compete with each other.[79] Thus, since subject imports and the domestic product are substitutable, it is not clear why the Commission would undertake an analysis to consider "whether, and to what extent, its predicted increase in imports from Canada would likely serve segments of the U.S. market *where purchasers do not consider Canadian and U.S. lumber to be close substitutes*," as the Panel requires.[80]

The Commission therefore requests that the Panel reconsider its conclusion that the Commission's determination regarding price effects is not supported by substantial evidence.

Considerable Curbing of U.S. Overproduction. The Panel's fourth conclusion is that the Commission's determination that the domestic industry has curbed its overproduction of softwood lumber is not supported by substantial evidence. The Commission requests that the Panel reconsider this conclusion.

The Panel claims that the Commission's conclusion as to likely price depressing effects

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[79]See Remand Determination at 90-94. In claiming that the Commission's "chart does not comport with the testimony elicited at the ITC hearing," the Panel claims it "has reviewed all the record testimony relied upon by the Commission. See ITC Hearing Transcript at 198-99, 189-90, 191-92, 201-02." Panel Decision II at 41, n.13. Yet, the Panel does not cite to all of the evidence relied on by the Commission as noted in the Commission's citation on the "chart" to Commission Hearing Transcript at 185-190 and 204-207; in particular, the Panel fails to take into account the contradictory evidence provided upon questioning by Commissioner Okun (pages 204-207) from the same four witnesses on which the Panel relies.

[80]Panel Decision II at 41.

"is too heavily dependent on the finding that the domestic industry has curbed oversupply, on which there is simply insufficient record evidence."[81] Yet it is the Panel, and not the Commission, that looks almost exclusively at an excerpt from a Bank of America publication regarding lumber overproduction.[82] The Commission, on the other hand, relied on a variety of factors in reaching its conclusion that the U.S. industry had cut back on its oversupply. The Panel apparently assumes, without any citation, that Canadian lumber mills grind up whole trees when the demand for wood chips for paper production is high, rather than produce more lumber in order to secure more of the byproduct – wood chips to meet the demand for paper production.[83] Moreover, it is the Commission, not the Panel, that has been tasked with interpreting the evidence, including whether "curbed" means "eliminated," as the Panel contends, or "a check, restraint, control," which is the Commission's interpretation.[84] Nevertheless, if the Commission had been provided sufficient time to conduct a thorough remand investigation, we would have reopened the record to attempt to collect additional information regarding domestic and Canadian supply in the first quarter of 2002 and in the imminent future.

IV. The Panel Violated U.S. Law and Basic Tenets of Fairness in Setting the Procedural Deadlines in this Remand Proceeding

In setting forth the procedures and deadlines for this investigation, this Panel has

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[81]Panel Decision II at 38.

[82]See Remand Determination at 80-87 and 103-104. The Commission relied on the U.S. and Canadian capacity, capacity utilization and production data.

[83]USITC Pub. 3509 at Figure I-1.

[84]The term "curb" is defined to mean "check, restraint, control." *Webster's Third New International Dictionary*, Merriam-Webster, Inc.: 1981, at 555.

repeatedly violated U.S. law and basic tenets of fairness. It is well settled that the Commission has "broad discretion to fashion its own rules of administrative procedure . . . [and] 'to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Avesta AB v. United States, 689 F. Supp. 1173, 1188 (CIT 1988) quoting Vermont Yankee Nuclear Power Corp. V. NRDC, 435 U.S. 519, 543 (1978). The Panel's actions in this remand determination are a clear attempt to limit the Commission's discretion to discharge its duties under the antidumping and countervailing duty statutes.

On May 10, 2004, after the Panel's second remand determination, the Commission requested an extension of time to enable it, among other things, to reopen the record to collect further information and to provide the parties with adequate opportunity for comment. In its May 18, 2004 denial of the Commission's motion, the Panel states that "the conclusions reached in the Panel Decision of April 19, 2004 address the same issues that the Commission had an opportunity to pursue (including a reopening of the record, if justified) in the 100 day remand following the Panel decision of September 5, 2003".[85] However, in its remand decision of September 5, 2003, the Panel stated that the Commission's remand "shall be conducted based on the evidence in the administrative record."[86] The Panel overstepped its authority in limiting the first remand to the evidence on the administrative record, as U.S. law clearly allows for the Commission to determine whether to reopen the evidentiary record on remand.[87] However, the

[85]Panel Decision on Motion (dated May 18, 2004) at 4.

[86]Panel Decision I at 112.

[87] In vacating a Court of International Trade decision on the basis that the CIT had exceeded its authority in directing a negative Commission determination, the Court of Appeals for the Federal Circuit in Nippon Steel stated: "[w]hether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission

Commission believed that additional explanation (without a reopening of the record) would be sufficient to satisfy this Panel's concerns set forth in its decision dated September 5, 2003, and therefore abided by the Panel's original order. The Panel is now stating that we cannot at this point reopen the record because we did not do so in our first remand investigation. In other words, the Commission's good faith efforts to comply with the Panel's explicit instructions in the first remand are now being used against the Commission to confine its scope of action.

The Panel also now suggests that the Commission's request for an extension of time to reopen the record is asking for a "blank check" or "unbridled discretion to launch a fresh, time-consuming investigation whenever the agency is displeased with the outcome of appellate review."[88] Such a suggestion by the Panel is unwarranted and a gross mischaracterization of the Commission's actions in this proceeding. It also inaccurately presumes that the Commission is looking for a particular outcome in reopening the record. The Court of International Trade has held that "[i]t is incumbent on the ITC to acquire all obtainable or accessible information from the affected industries on the economic factors necessary for its analysis." Roquette Freres v. United States, 583 F. Supp. 599, 604 (CIT 1984).[89] Moreover, this case is not the "exceptional situation in which [a] crystal-clear [agency] error renders a remand an unnecessary formality."

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itself to determine." Nippon Steel, 345 F.3d at 1382 (Fed. Cir. 2003).

[88]Panel Decision on Motion (dated May 18, 2004) at 3.

[89]The U.S. Supreme Court recently emphasized that when a court is reviewing agency action "the proper course, except in rare circumstances, is [for the court] to remand to the agency for additional investigation or explanation." Immigration and Naturalization Service v. Ventura, 123 S.Ct. 353, 355 (2002). The Court reaffirmed the fundamental principle of judicial review of agency action that, when Congress has entrusted a particular decision to an agency by statute, "judicial judgment cannot be made to do service for an administrative judgment." Id., citing SEC v. Chenery Corp., 318 U.S. 80, 88 (1943).

National Labor Relations Board v. Food Store Employees Union, 417 U.S. 1, 8 (1973). As is mandated by U.S. law, the Commission is merely attempting to acquire additional information to make a reasoned determination of the economic factors necessary for its analysis in view of the Panel's remand determination. The Panel's statement that these issues could have been addressed in the last remand determination overlooks the fact that in its determination dated April 19, 2004, the Panel for the first time discounted, ignored, or otherwise criticized probative information relied upon by the Commission in making that determination.

In denying the Commission's request for an extension of time to reopen the record, the Panel also focuses on the need for a "speedy" review. However, U.S. law, which binds the Panel, holds that agencies may not "sacrifice fairness and accuracy for the sake of expediency alone."[90] The Federal Circuit in Koyo Seiko reversed a CIT order to Commerce to use incomplete and inaccurate data to avoid delays in completing an administrative review. As the Court then noted, Congress' objective in the Trade Agreements Act was "to ensure fair and equitable treatment of all parties concerned with antidumping proceedings . . . [and that] the Act did not [intend agencies to] sacrifice fairness and accuracy for the sake of expediency alone."[91] Moreover, the Panel's refusal to grant the Commission an extension of time in this remand proceeding violates NAFTA rules. In instructing the panel on the time period to set for compliance with a remand, NAFTA Article 1904.8 states that the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the

[90] Koyo Seiko Co. v. United States, 20 F.3d 1160, 1167 (Fed. Cir. 1994).

[91] Id.

factual and legal issues involved and the nature of the panel's decision.[92] This case involves a very large record. The Panel's decision is over 50 pages in length, and raises a number of complex issues in an investigation with an already voluminous record. The Panel itself had over four months to conduct its review of the Commission's Remand Determination. The eleven calendar days provided by the panel to respond to its second remand was grossly inadequate taking into account the complexity of the factual and legal questions and the nature of the panel's decision.[93]

In light of the Panel's refusal to give the Commission a reasonable amount of time to fully respond to the Panel's decision and, in particular, to reopen the record to obtain the evidence needed to resolve a number of the issues raised by the Panel, the Commission requests that the Panel reconsider the Commission's request for an extension of time.

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[92]NAFTA Article 1904.8. The Article further states that in no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint, or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. The time period permitted for the final phase of a Commission investigation ranges from 120 to 180 days. See 19 U.S.C. §§ 1671 and 1673 et seq.

[93]The Panel's original instructions provided for a 21 day response time. As the Panel is well aware, the release of the Panel's decision was delayed pending resolution of a dispute based on allegations of a conflict of interest regarding one of the panelists. On April 26, 2004, the Chairman of the Panel informed some of the parties that the decision had been delivered to the Office of the U.S. NAFTA Secretariat. However, contrary to Rule 23 of the NAFTA Rules of Procedure, the Commission was not served with this document at that time. After the Commission pointed out the error on April 27, 2004, a faxed copy of the statement was provided to the Commission on April 28, 2004. The Commission did not receive the Panel's remand decision until April 29, 2004. Notwithstanding that fact, the Panel published notice in the *Federal Register* on May 5, 2004 (69 Fed. Reg. 25068, dated May 5, 2004) that the Commission had to file its remand determination on May 10, 2004 - only 11 calendar days from the date on which the Panel's Decision was first provided to the Commission and only 5 days from publication in the Federal Register.

V. Conclusion

Given the Panel's violation of U.S. law and basic tenets of fairness in refusing to grant the Commission a reasonable amount of time to respond to the Panel's determination, the Commission seeks a reconsideration of its request for an extension of time to reopen the record and to reply fully to the Panel's determination.

The Commission seeks a reconsideration in light of the all of the record evidence and the analysis provided by the Commission in its original determination and its remand determination of the Panel's conclusions that:

1) the Commission's determination that the U.S. softwood lumber industry is threatened with material injury is not supported by substantial evidence;

2) the Commission's findings regarding Canadian producers' excess production and projected increases in capacity, capacity utilization and production related to increases in imports were not supported by substantial evidence;

3) the Commission's findings regarding the volume of imports and the rate of increase in the volume or market penetration of imports were not supported by substantial evidence;

4) the Commission's determination that Canadian softwood lumber was entering the U.S. market at prices that are likely to have a significant depressing or suppressing effect on domestic prices was not supported by substantial evidence; and

5) the Commission's finding that the domestic industry had curbed its overproduction was not supported by substantial evidence.